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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP2141-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN M. SMITS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN BROWN COUNTY CASE 2015CM1575, THE HONORABLE JUDGE DONALD ZUIDMULDER PRESIDING, AND FROM AN ORDER DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON GROUNDS THAT DEFENDANT DID NOT HAVE PROPER NOTICE

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The parties agree that the question of whether the trial court should have allowed an additional charge after the close of trial in this case is a question of law, reviewed de novo. *See* State v. Goodson, 2009 WI App 107, ¶7, 320 Wis. 2d 166, 771 N.W.2d 385.

The State relies heavily in their response on cases where the Court has allowed the State to amend a charge during the course of trial. However, in this matter the State did not amend a charge, it added an additional charge. Also in the cases cited by the State, each one also indicates that the amendment is allowed if it does not prejudice the defendant. See *State vs. Flakes*, 140 Wis.2d, 411, 410 N.W.2d 614 (Ct. App. 1987); *State vs. Wickstrom*, 118 Wis.2d 339, 348 N.W.2d 183 (Ct. App. 1984). It is clear adding another count to a charging document is prejudicial to the defendant.

Additionally, the State argues that the Defendant is put on notice of the new charge and therefore he was able to defend against it. The State relies heavily on *Wickstrom*, to indicate that Smits was not prejudiced by the additional count being added. However, this case is distinguishable from *Wickstrom*, because the defendant in that matter had a week's notice prior to the trial of the additional count being added. Smits did not have notice or an opportunity to defend against this additional charge as it was added after the close of trial. None of the cases the State cites to have a fact pattern where a charge was amended or added after the close of trial.

The State indicates that relying on *State vs. Neudorff* is misplaced, however, it addresses the heart of the issues in this matter, the lack of notice and the prejudice against the

defendant when adding a charge. The defendant was not put on notice that there would be a second count of obstructing because it was not added until after the defense rested. The State actually debated on what charge it would even add; the record shows there was contemplation of adding a disorderly conduct instead of the second count of obstructing. *R. 74-225.* Ultimately, the State choose the latter, however, the defendant could not possible prepare a defense when he does not even know what the charge would be until after the close of evidence in a trial.

To allow the State to be able to amend the charging document after the close of trial most certainly prejudices the defendant and does not provide any notice to what charges he is actually facing. There are also issues of negotiations prior to trial where the defendant would not know the extent to what he is facing if the State could just amend it after the trial concludes.

The defendant was prejudiced by the addition of a second count of obstructing. He was sentenced on this matter and had to pay additional court costs and supervision fees. If he were revoked from probation he would be facing another nine months in the county jail. It additionally, has future implications if he were ever charged with a crime again he could be considered a repeater due to the additional charge that was added after trial. To argue that he does not suffer more consequences from the State adding an extra charge is clearly incorrect.

CONCLUSION

Smits was denied his constitutional right to be put on notice of the charge(s) he was facing at trial. As such, Smits is entitled to a new trial or an order vacating the judgment of conviction as it relates to count four of the amended criminal complaint and for the Court to instruct the clerk of circuit court to enter a judgment of acquittal on count four.

Dated this 22nd day of May, 2018.

Respectfully submitted,

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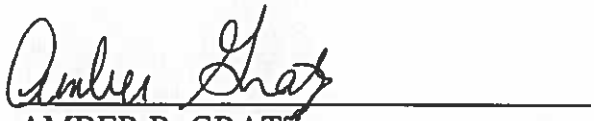
CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 631 words.

Dated this 22nd day of May, 2018.

Signed:



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of May, 2018.

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